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THE CANADIAN LEGAL SYSTEM:
INSTITUTIONS, VALUES AND PROCESS

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THE REGULATORY PROCESS

CHAPTER XIII: DISCUSSION PROBLEM: AIR CANADA TAKEOVER OF NORDAIR

Introductory Note

The general purpose of this chapter is to provide materials that will allow for preliminary study of three of the most basic issues of administered regulation. While the role of regulation has increased dramatically over the course of the twentieth century with the proliferation of various administrative tribunals, many of the process issues of regulation have remained largely unexplored in Canada until most recently. The purpose of the study here is to subject the regulatory process to the same kind of analysis as the adjudicative and legislative processes experienced in earlier chapters of this book. Once again, the focus will be on tasks that can be performed well through the administrative process and on attempting to suggest the limits of the process. As well, the materials raise questions concerning how regulatory processes should be structured if they are to achieve some of the objectives to which they aspire.

Three issues will be addressed in this chapter. The first concerns the manner by which administrative tribunals undertake their lawmaking tasks. In particular, the materials raise questions concerning the implications of a failure to address the issue of policy-making specifically, as well as issues relating to policy-making through adjudication or through rule-making procedures. They then examine the issue of political responsibility for administrative decision-making and consider both the reforms that must be undertaken if political theory is to accord with present fact, and issues relating to whether, and if so how, administrative bodies can be made more accountable for their activities. Finally, the materials consider the role of public participation in administrative decision-making, assessing the desirability of, or the need for, public participation, the obstacles to such participation, and reform measures that might be introduced in order to encourage increased participation.

All of these issues will be considered in the context of a single problem. The problem relates to a take-over of Nordair Ltd., a Montreal-based regional carrier by the national airline, Air Canada, and the role of the Canadian Transport Commission and of the Federal Cabinet in this acquisition procedure. We believe that careful study of the events and processes involved will serve to raise the issues considered in the detailed reading material that follows, and will provide a suitable basis for classroom discussion.

The problem will be outlined generally by means of a short chronology presented immediately below followed by more detailed information concerning the context of the regulatory and executive decisions that were taken in the case, and some detail from the actual contents of those decisions. During the year 1977, Transair Ltd. applied to the Air Transport Committee of the Canadian Transport Commission to suspend the commercial air services operated by it between Winnipeg, Dryden, Thunder Bay, Sault Ste. Marie and Toronto pursuant to a licence that had been granted to it earlier. Subsequently, applications were filed with the Air Transport Committee by Great Lakes Airlines Ltd. and Nordair Ltd. to operate commercial air services between Winnipeg, Dryden, Sault Ste. Marie and Toronto, provided the Air Transport Committee suspended or cancelled the commercial services of Transair. On December 9, 1977, the Air Transport Committee commenced public hearings to consider these applications. The hearings terminated on February 2, 1978.

On January 11, 1978, Air Canada notified the Air Transport Committee (under s. 27 of The National Transportation Act) that it proposed to acquire the shares of Nordair. The notice was served while the public hearings with respect to Great Lakes, Nordair and Transair were in progress. During April, 1978, the Air Transport Committee held public hearings relating to the proposed acquisition of the shares of Nordair by Air Canada. At this hearing, a great many parties intervened to put their points before the Air Transport Committee. The intervenors included C.P. Air, the Government of Ontario, the Director of Investigation and Research of the Ministry of Consumer and Corporate Affairs, Suntours Ltd., The Government of Quebec, Quebecair, The Alliance of Canadian Travel Association, the Consumers' Association of Canada, and a number of others. After a hearing that lasted for 11 days, the majority of the Air Transport Committee resolved not to disallow the Air Canada take-over. The Vice-President of the Canadian Transport Commission concurred in the reasons given by the majority for reasons quite different from the majority reasons, and Commissioner L.R. Talbot dissented. Excerpts from the Air Transport Committee's decision are reproduced below.

Two "appeal" procedures were then launched. A number of the parties opposed in interest to Air Canada "appealed" to the Federal Cabinet as permitted by s. 64(1) of the National Transportation Act, R.S.C. 1970, c. N-17:

> "The Governor-in-Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether

> such order or decision is made inter partes or otherwise, or whether such regulation is general or limited in its scope and application; and any order that the Governor-in-Council may make with respect thereto is binding upon the Commission and upon all parties."

This "appeal" was led by the Ontario Government and was acquiesced in by many of the intervenors at the Canadian Transport Commission hearings, each of whom filed petitions to support their plea that the Air Transport Committee's decision should be changed.

At about the same time, Quebecair Ltd., another intervenor at the Canadian Transport Commission hearings, pursued another appellate procedure. Quebecair applied to the Review Committee of the Canadian Transport Commission, a Committee authorized "... to review, rescind, change, alter or vary any order or decision made by [the Commission] or ... (to) rehear any application before deciding ..." (The National Transportation Act, s. 63). Under the general rules of the Commission, the Review Committee is to "determine whether the order of the decision should be reviewed and may then, in its discretion, either dispose of the application or refer it for review to the Committee that had made or issued such order or decision ..." (general rules under The National Transportation Act, General Order 1967-1 Rule 770(c)). However, the Transport Commission decided to await the Cabinet's decision on the various petitions that had been filed with it, before the Transport Commission would proceed with Quebecair's appeal.

Some of the procedural difficulties faced by the petitioners and respondents in the Cabinet appeal are suggested by the material reproduced below. Eventually, after several months' delay, the Cabinet announced its decision. Air Canada's year long effort to acquire Nordair's share would be successful, but the shares would have to be turned over immediately to the Ministry of Transport for safekeeping. The Ministry of Transport would then seek out private buyers of Nordair and would return the airline to the private sector within 12 months from the date of the Cabinet's decision (November 7, 1978).

Since that time, negotiations for the return of control of Nordair have been conducted for the Federal Government through Air Canada. While a number of existing airlines, transport companies, and even Nordair's present management and employees have expressed interest in acquiring the company, the ultimate fate of Nordair remains, to this date (December, 1979) up in the air.

We reproduce below excerpts from the decision of the Canadian Transport Commission (Air Transport Committee) from the petitions of intervenors to the Cabinet, from Quebecair's application for a rehearing before the Review Committee of the Canadian Transport Commission, and from newspaper articles that provide further background on this problem.